II.

Whether a Defendant Has Been Denied Counsel Does Not Turn on Whether He Has Engaged an Attorney, nor Can the Voluntary Character of a Confession Be Determined by Looking to Nothing More Than the Presence or Absence of Threats or Promises.

Respondent would make capital of the fact petitioner had not engaged an attorney at the time of the questioning (Resp. Br. 22) and mistakenly maintains that petitioner's case is based upon the fact he did not have counsel of his choice (Resp. Br. 37). No such proposition is advanced. To state it succinctly, our position is that, in the circumstances of this case, despite his repeated requests, Atchley was denied an opportunity to contact counsel—not that he was prohibited from consulting any particular attorney. Atchley's testimony, which stands uncontroverted in the record, is that he "asked for a lawyer ten times . . . Everyone I talked to, I still asked them for a lawyer" (R. 382). It cannot be said, as respondent attempts to do (Resp. Br. 18), that petitioner is seeking to exclude any conflicts and confine the Court to Atchley's own statements. There is no conflicting evidence. Indeed, the California Supreme Court noted that this refusal to permit petitioner to talk to counsel suggests an intent to coerce, although it went on to find that such refusal alone would not have led the trial judge or jury to find that coercion in fact existed (R. 567). Nor do we ask this Court to find coercion from the fact, *standing alone*, that the authorities erected an effective barrier between Atchley and an attorney; but it is a potent factor to be considered with the other facts of the case.

Respondent overstates petitioner's contentions when it says we insist upon the right of an arrested man "to be free from any questioning until he has his counsel present"

(Resp. Br. 35). We merely say, as does California in its Penal Code (Sec. 825) that an arrested man has the right to be visited by an attorney at his request. It begs the question to say that Atchley had not engaged counsel (Resp. Br. 22). How can any man "engage" counsel if he cannot contact counsel? And that Atchley, or any other arrested person, may have relatives is inconsequential. The Penal Code section is in the disjunctive; and both its purpose and considerations of justice are the same. It is foreign to our way of thought that a man should be held at the mercy of the police without benefit of counsel. Certainly the police may question such a person before he has an attorney. But just as surely, he has a right to be apprised of his legal rights before answering questions, especially where—as here—he has expressed a desire for legal assistance, and more particularly where a confession is obtained by physical force or—as in this case—by treachery and deceit. It is a dangerously sophistic argument to say that to detain a man and to question him, not permitting him to call an attorney, would hamper and overburden law enforcement. Pleas of guilty easily secured by similar means, or the elimination of the appellate process might likewise lighten the burden of the courts. But such a philosophy is more attuned to the police state than to constitutional government and our concepts of justice. The protection of society remains the primary aim, and rightly so; but the protection of society does not require that the work of the police be made easier when the price is the constitutional rights of the members of that same society.

The record shows that Travers made no threats and held out no promises to Atchley. Petitioner does not claim otherwise. Nor is this a case of police brutality or threats of mob violence. But, while any of the enumerated factors would clearly render a confession induced thereby involun-

tary, there are other inducing causes which equally may operate to overcome the free will of a defendant, as was done in this case. Historically, too, this has been so. Bernardus Guidonis, the early historian of the Inquisition, has recorded that, as well as weakening the physical strength of the victims, moral subterfuges were also sometimes used to secure confessions, torture being the extreme expedient, and with confessions extorted in the torture chamber required to be subsequently "freely" confirmed. The facts in *Fikes* v. *Alabama*, 325 U.S. 191, 1 L. Ed. 2nd 246, 77 S. Ct. 281, reveal no threats or promises. Nor do they in the recent case of *Blackburn* v. *Alabama*, 361 U.S. 199, 4 L. Ed. 2nd 242, 80 S. Ct. 274, where the Chief Deputy Sheriff testified no one had threatened Blackburn in any way. The controlling principles are set out in *Ziang Sung Wan* v. *United States*, 266 U.S. 1, 45 S. Ct. 1, 69 L. Ed. 131:

> "The Court of Appeals appears to have held the prisoner's statements admissible on the ground that a confession made by one competent to act is voluntary as a matter of law if it is not induced by a promise or a threat, and that here there was evidence sufficient to justify a finding of fact that these statements were not so induced. In the Federal Courts the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was voluntarily made. A confession may be given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise."

Even though *Ziang* was a case in the Federal Courts, subsequently decided cases dealing with the Fourteenth Amendment and elsewhere cited herein indicate that the same standards as to voluntariness will be applied to state court proceedings.

The citation of a number of cases is not particularly helpful; the facts of each case will necessarily vary (e.g., *Ziang* shows a much more brutal case than is here present), but the determinative standard remains the same: whether the accused, at the time of his confession, was possessed of mental freedom to confess or to deny commission of the crime. To say that only when he has been promised immunity or special consideration or has been threatened with violence is his free will overcome is to take a long step backward, socially as well as juridically.

III.

Giving Due Consideration to the State Court Decision, This Court Must Still Determine the Ultimate Constitutional Issues.

While it may be that factually this case differs from *Rogers* v. *Raymond*, 40 O.T. 1960, —— U.S. ——, 5 L. Ed. 2nd ——, 81 S. Ct. ——, in that it does not so clearly appear that the California court based its decision on improper criteria, yet this is not absolutely certain when the case is examined as an entirety. The California Supreme Court says (R. 566-567):

> "... Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted the testimony or suggested that any of his recorded statements were untrue.

> Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily."

When the California court refers to the fact that defendant did not suggest the untruth of his recorded statements, there arises the likelihood that they were, in fact, considering at least in part, the case by criteria held improper in *Rogers, supra,* i.e., truth or falsity; and the quoted statement shows also they relied upon a further criterion held insufficient in *Ziang, supra,* i.e., nothing more than threats or promises.

Moreover, the State court's finding that Travers' reference to insurance was for the purpose of "explanation" is not binding on this Court, where the question is not whether his statements were an "inducement" but whether they were the means of circumventing petitioner's free will by misleading him as to the real purpose of the conversation. Yet even the question of whether this was merely an explanation should be considered in light of the fact that Travers made no notations, save the names of the children (R. 232-233). If this were a legitimate explanation of the purpose of the interview, one would expect more legitimate insurance activity by Travers.

When the trial court listened to the tape in chambers, the prosecution said they expected merely to have Travers identify the tape, not to testify as to what had been said, and then to play it to the jury (R. 188). Counsel for defen-

dant objected, primarily upon the ground that these were privileged communications; but in the course of stating and arguing his motion, he urged also that they were not free and voluntary (R. 190). The trial court denied the motion, holding there was no privilege and the fact the statements were incriminatory did not render them inadmissible. The court refused to consider the question of voluntariness before hearing the tapes, saying that only if it was a "full-fledged" confession would the question arise and if they were admissions merely, it was merely a question of weight. The court also directed defense counsel not to renew his motion before the jury because "it gives a false impression" (R. 192), a caution which was later repeated (R. 221). In chambers an objection on the ground of voluntariness, or the lack thereof, was overruled (R. 213). The significant thing here is that the sole criterion offered by the prosecution and the sole test considered by the court was whether any threats or promises had been made (R. 216-217, 220); and the court refused consideration to the question of whether or not the defendant had had an attorney (R. 234) as a question for the jury. Indeed, the matter of threats or promises was the only foundation required or laid before the tape was played to the jury, other than Travers' conclusion that the statements were free and voluntary (R. 226); under the rule established in *Ziang, supra,* this was not enough. Incidentally, it is of little consequence whether defendant or his counsel considered the statements as a confession; but respondent is in error in stating that they did not (Resp. Br. 32). The opinions of the defense mean little here; regardless, counsel did clearly indicate that he so regarded the tape (R. 216, 217, 218, 220). It is not what the parties or counsel thought, nor what the trial court erroneously ruled; it remains for this Court to look to the facts—all of the facts—and determine whether due process is satisfied.

As the Court examines the facts, petitioner respectfully offers the following observations on some of respondent's contentions:

That petitioner would not have seen Travers if he had first been permitted to see an attorney (Resp. Br. 36). Such is not the contention; as was said in the opening brief, perhaps the need to see him would not have arisen, and almost certainly Atchley would not have made the damning statements had he had counsel. It is significant to note here that while Atchley's pleas to get an attorney were ignored, he was permitted personally to use the telephone to call Travers (R. 224, 231). Also going to show Atchley's enforced reliance upon Travers is the fact that he asked him to call his brother in regard to the welfare of his child (R. 233). If Atchley was not, in effect, held incommunicado from all but Travers, why was this necessary? Regardless of what an attorney might have done for him in this regard, there remains the question of why he did not call his brother directly. Atchley's statement that he wanted an attorney to get the fingerprints of the decedent from the gun (R. 382, 384) indicate his awareness that he was in need of legal assistance, and cannot reasonably be construed as a limitation of the purposes for which he sought such assistance.

That Atchley had previous experience with the law, had testified falsely under oath, and had previously utilized attorneys' services (Resp. Br. 39). Petitioner knows of no principle denying the benefits of the Fourteenth Amendment merely because one has previously committed perjury. Indeed, the protective cloak of Due Process has many times been thrown over those with a far longer prior criminal record. (See, e.g. *Chessman* v. *Teets*, 354 U.S. 156, 1 L. Ed. 2nd 1253, 77 S. Ct. 1127.) Neither Atchley's previous conviction of drunk driving (R. 357, 358) nor

his consulting various attorneys on business matters (R. 384-385) are material. There is no claim that he was in ignorance of his right to counsel. On the contrary, he attempted to exercise that right but was prevented by agents of the State from doing so. His previous experience would neither prevent nor off-set the overbearing of his will, accomplished by subterfuge; nor does it aid in determining whether he was denied the aid of counsel at a crucial stage, or whether the confession was the product of his free will.

That Atchley cannot now show that, had he been permitted to see counsel, it would have precluded him from answering or that he would have stated matters differently than he did at the trial (Resp. Br. 37). The answer is simply that petitioner is not required to make any such showing. Respondent apparently misconceives the effect of receipt of the challenged confession. If it is found—as petitioner maintains—that it was involuntary, then the entire trial is so tainted as to be so repugnant to the Constitution that not even the truth of the matters contained in the confession can serve to validate the conviction (*Rogers* v. *Raymond*, *supra*).

That Atchley did not question the voluntariness of the confession when testifying at the trial (Resp. Br. 26). As already shown, *supra* under par. II of Argument, this legal objection was raised by counsel. It is true that Atchley did not testify in so many words, "I did not voluntarily confess to Mr. Travers. I didn't know I was doing that. My free will was overcome." But what would such testimony have added? Such a self-serving conclusion would have aided neither the trial court or jury, nor even this Court. It is the facts which must determine; and the record sets forth the facts which show that Atchley's free will was overcome (Pet. Br. 6-9).

As already stated, petitioner has no intention of limiting this Court to a consideration of Atchley's testimony to the exclusion of contradictory evidence (Resp. Br. 18). The uncontroverted facts as to the denial of counsel and as to Travers' activities have been noted. It may be that respondent has reference to the evidence concerning the amount of sleep enjoyed by Atchley. Petitioner is content to refer to the opening brief, with this one addition: Atchley testified directly that he did not sleep during the time in question (R. 418-419, 415, 382). The State did not rebut this with evidence from anyone in a position to know, e.g., his keepers or cell-mates, but merely attempted to impeach him with a statement made to Mr. Lazere (R. 129).

That petitioner is not a member of a minority race, nor a minor (Resp. Br. 22). Granted. Granted also that such factors are significant in judging whether or not a confession has been illegally obtained. Perhaps it might be said by some that a Tennessee hill-billy is a member of a minority in northern California; but this is not a *sine qua non*. And surely respondent does not mean to infer that only a member of a minority race or one under legal age can so be denied the right to counsel, or so have a confession coerced from him against his will, or otherwise suffer deprivation of his right to due process, as to warrant action by this Court. As to Atchley's business ability, the opposing parties could endlessly reiterate their contrary views (e.g., Resp. Br. 39); but it is submitted that a fair summing up was given at the trial by a witness (R. 463) who described Atchley as knowing his way around in the used car business, where he could make a comfortable living.

Respondent would also urge that the tape recording must now be said to have been voluntary because of the fact that, in arguing to the jury, defense counsel said that

he himself would have introduced the tape had the prosecution not done so, and then discussed the confession. Apart from the utter immateriality of what counsel may have believed or said (as distinguished from what this Court determines), such argument belies the facts of legal trial life. Objection to the tape had been overruled, and it had been admitted in evidence and played to the jury (R. 237-238). Counsel's strategy was thus determined for him, in effect, by the prosecution. It would have been foolhardy ostrich-like to ignore the tape. He had to do what he could to mitigate its effect upon the jury; and the methods he chose have nothing whatever to do with the basic question of whether the confession was the product of defendant's free will.

Conclusion

Petitioner submits that the conduct of the State, bent upon securing a conviction, in extracting a confession from an unlettered man after he had been held and questioned, sleepless for 48 hours, through the medium of one whom the confessor thinks is acting in his interests but who, in questioning and permitting the recording of the confession, is acting at the request of the State Authorities, the confessor having been refused the benefit of legal counsel, so operates to prevent the exercise of free will that the confession is involuntary, in fact and within the purview of the Fourteenth Amendment, and the conviction based thereon cannot stand.

Dated: April 14, 1961.

Respectfully submitted,

ROSALIE S. ASHER
Attorney for Petitioner

J. R. KING, JR.
Of Counsel

SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1960.

Veron Atchley, also known as Jack Atchley, Petitioner, v. California. | On Writ of Certiorari to the Supreme Court of California.

[May 1, 1961.]

Per Curiam.

After hearing oral argument and fully examining the record, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed.